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No. 375

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

VELMA L. MENGELKOCH, MARY FAZZIO, and DEA C. KASKELA, as citizens of the United States and of the State of California, on their own behalf and on behalf of all other citizens of the State of California similarly situated,

APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

JURISDICTIONAL STATEMENT

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No.

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APPELLANTS

v.

INDUSTRIAL WELFARE COMMISSION, and NORTH AMERICAN AVIATION, INC., a corporation,

APPELLEES

JURISDICTIONAL STATEMENT

Appellant Velma L. Mengelkoch appeals from the judgments of the United States District Court for the Central District of California entered on May 10, 1968, refusing to declare invalid and to enjoin enforcement of section 1350 of the California Labor Code, as requested in appellants' complaint, and also refusing to adjudicate appellants' cause of action under Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253, 42 U.S.C. 2000e). Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The court below rendered two opinions, one sitting as a three-judge court and the other sitting as a single-judge court. Neither opinion is officially reported but they may be found in 68 L.R.R.M. 2273 and 68 L.R.R.M. 2277, respectively. A copy of each opinion is attached hereto as Appendix A.

GROUNDS OF JURISDICTION

This action was brought as a class action under both Title VII of the Civil Rights Act of 1964 and 28 U.S.C. 2201 and 2202, (1) to declare invalid and enjoin enforcement of section 1350 of the California Labor Code, which restricts the hours of work for women but not for men, and (2) to enjoin defendant North American Aviation, Inc., from discriminating against appellant and other women employees because of their sex in violation of section 703(a) of the Civil Rights Act of 1964, 78 Stat. 241, 255.

A three-judge court, convened pursuant to 28 U.S.C. 2281, 2284, entered a final judgment denying the relief requested by granting the motion to dismiss of defendants Division of Industrial Welfare and Industrial Welfare Commission and dissolving itself. On the same day, the single judge assumed jurisdiction and dismissed the case. By dissolving itself as a three-judge court after decision of the constitutional issue on its merits, the three-judge court denied the injunction and dismissed the case as effectively as if it had used the words "injunction denied." See *Glen Oaks Utility, Inc. v. City of Houston*, 280 F.2d 330, 333 (C.A. 5, 1960); *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188, 192.[1]

The judgment of the District Court was entered May 10, 1968, and notice of appeal to this Court was filed June 7,

[1] See Stern & Gressman, *Supreme Court Practice* (3rd Ed., 1962), page 164, which states that the court is "deciding a case on the merits when it dismisses for want of a *substantial* question."

1968.[2] The jurisdiction of the Supreme Court to review the decision below by direct appeal is conferred by 28 U.S.C. 1253. *Gray v. Sanders*, 372 U.S. 368, 370, 379; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73; *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287.

STATUTES INVOLVED

The text of section 1350 of the California Labor Code, and the applicable sections of the Civil Rights Act of 1964, are set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether section 1350 of the California Labor Code, which discriminates against female persons in employment opportunities, job advancements, and opportunities to earn overtime compensation, by restricting the hours of labor of such female persons, but not the hours of labor of male persons, is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution so as to have required the issuance of an injunction by the three-judge court.

2. Whether section 1350 of the California Labor Code, which denies equal employment opportunities to women by requiring and permitting that they be discriminated against in employment on the basis of sex, was nullified and superseded by sections 703(a), 708 and 1104 of the Civil Rights Act of 1964 (78 Stat. 241, 253) by virtue of the Supremacy Clause of the United States Constitution, Article VI, Para. 2, inasmuch as the said state statute directly conflicts with the federal statute and has the effect of perpetuating invidious discriminations against women in employment, this being the very evil which the federal statute was designed to remedy.

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[2] A precautionary notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed in the court below on June 10, 1968.

3. Whether section 703(a) of the Civil Rights Act of 1964, which prohibits employers subject to it, including defendant North American Aviation, Inc., from discriminating against employees or applicants for employment because of sex, required the District Court to grant the relief requested under section 706 of the Civil Rights Act of 1964 and 28 U.S.C. 2201, 2202, rather than relegating plaintiffs to the state courts of California which have no jurisdiction to entertain a suit under the Civil Rights Act of 1964.

4. Whether the District Court's dismissal of this action deprived the plaintiffs and other women similarly situated of their rights under the Due Process Clause of the Fifth Amendment of the United States Constitution to seek redress in the courts of the United States for alleged violation of their rights under the Constitution and laws of the United States, specifically the Fourteenth Amendment, and 28 U.S.C. 2201, 2202, and sections 703(a), 706, 708, and 1104 of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

This case involves the validity of a California statute restricting the working hours of women solely because of their sex, which thus denies them employment in many occupations, as well as opportunities for promotions and for earning overtime pay.

The plaintiffs below, Mrs. Velma L. Mengelkoch, Mrs. Mary Fazzio, and Mrs. Dea Kaskela, are employed as assemblers by the defendant, North American Aviation, Inc. They brought this suit on behalf of themselves and other working women similarly situated for the twofold purpose of (1) enjoining the California State Industrial Welfare Commission and Division of Industrial Welfare from enforcing Section 1350 of the California Labor Code on the ground that this section requires an employer to discriminate against plaintiffs on the basis of their sex contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; and (2) restraining North American Aviation, Inc. from any further violations of Section 703(a) of the Civil

Rights Act of 1964. The complaint also asked the court to "retain jurisdiction until such time as the defendants herein have shown compliance with the injunctive relief granted," and for "such other and further declaratory decrees as may be proper in the premises."

After the complaint was filed, a three-judge court was convened as required by 28 U.S.C. 2281, 2284. The California Industrial Welfare Commission then moved to dismiss the action. The motion to dismiss was heard by the three-judge court on April 18, 1967. More than a year later, on May 10, 1968, the District Court held that the constitutional issue was not substantial and dissolved itself as a three-judge court, thereby denying injunctive and all other relief sought by the plaintiffs. The three-judge court's opinion and order denying the injunction gives three bases: (1) the constitutional question is insubstantial because special restrictions on hours of labor for women only had been upheld by the California courts in *Ex Parte Miller,* 162 Cal. 687, 124 Pac. 427 (1912), and by the United States Supreme Court in two cases decided more than a half-century ago: *Muller v. Oregon,* 208 U.S. 412 (1908); *Miller v. Wilson,* 236 U.S. 373 (1915); (2) the Supremacy Clause of the Constitution does not furnish a basis for three-judge court jurisdiction; and (3) under the Civil Rights Act of 1964, only the Attorney General of the United States may invoke three-judge court jurisdiction.

On the same day that the three-judge court denied plaintiffs' request for relief, the single-judge court invoked the abstention doctrine and dismissed the case for the stated purpose of giving the California courts another chance to interpret its law restricting employment opportunities for women. The single judge said "[t]his disposes of all matters pending in this case." (App. A, page A-18) Obviously, the court ignored the Civil Rights Act question, for only the Federal Courts, not the State courts, have jurisdiction over actions under the Civil Rights Act of 1964. The single-judge court, overlooking 28 U.S.C. 1253, stated that plaintiffs'

"objective of a direct appeal to the Supreme Court on the merits is not attainable because a three-judge court has been found to be inappropriate and has been dissolved." (App. A, p. A-12.)

SUBSTANTIALITY OF QUESTIONS PRESENTED

This appeal raises constitutional issues which are so substantial and of such great magnitude as to require plenary consideration by this Court with briefs on the merits and oral argument. The issues are of importance to 35 percent of the Nation's work force and to 51 percent of its population who are women. While neither the Attorney General nor the Equal Employment Opportunity Commission has seen fit to participate in this case, the issues are of great importance to the administration and enforcement of Title VII of the Civil Rights Act of 1964. The importance of the issues presented is thus "enormous" (App. A, p. A-17). The court below recognized this (*ibid.*), and its statement that the issues are not substantial rests entirely on its view that they had been settled by this Court's decision in *Muller v. Oregon*, 208 U.S. 412 (1908). The *Muller* decision, we submit, is anachronistic and plainly distinguishable from the instant case. We shall also show that the decision below ignores this Court's numerous civil rights decisions as well as its decisions holding that the right to earn a living is a fundamental right of all persons. In addition, the decision below is in conflict with the rationale of the three-judge court decision in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala., 1966).

1. Not since *Brown v. Board of Education*, 347 U.S. 483 (1954), has a case raised more substantial constitutional issues than does the instant case. Since California and at least 40 other jurisdictions have restrictive labor laws which apply to women only, the constitutionality of these restrictive laws is sufficiently important to warrant review by this Court. See *New York v. O'Neill*, 359 U.S. 1, 3. Moreover, in sustaining these restrictive laws and in refusing to hold

that they have been superseded by the Civil Rights Act of 1964, the court below has practically nullified the protection against sex discrimination which Congress sought to give working women. The legislative history shows that protection against sex discrimination was included in the Civil Rights Act because Congress recognized that women, regardless of race, were subjected to invidious employment discrimination comparable to those inflicted upon racial minorities.[3]

The legislative history further shows that Congress recognized that the so-called "protective" laws of the States limiting employment opportunities for women, have become a major cause of discrimination against working women. Both the proponents and the opponents of the sex amendment of Title VII believed that it would supersede the application of state restrictive laws, and it was the intent of Congress to free women from such legislative restrictions.[4] The decision below ignores this legislative intent and has the effect of judicially repealing and nullifying the very purpose of the sex discrimination provisions of the Civil Rights Act. Under the decision below, all an employer has to do to evade the Federal law is to point to the state law requiring special treatment for women employees.

The importance of the issues presently before this Court is demonstrated by the volume of litigation now pending in federal courts in which women workers seek to invoke the

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[3]See H. Rept. No. 914, part 2, 88th Cong., 1st Sess. (1963), additional views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias, and Bromwell, which cites statistics of the Bureau of the Census showing that in 1960 the median wage in the United States was for white men–$5137, for nonwhite men–$3075, for white women–$2537, and for nonwhite women–$1276.

[4]Congresswomen Martha Griffiths and Catherine St. George, who favored equal employment opportunities for women, and Congressmen Emanuel Celler and Abraham Multer who were opposed, agreed that the effect of the sex discrimination amendment would be to supersede state laws regulating employment on the basis of sex. 110 Cong. Rec. 2580, 2577-8, 2732 (1964).

protection of the 14th Amendment or the Civil Rights Act or both. See *e.g., Ward v. Luttrell* (No. 67-1622, E.D. La.); *Roig v. Southern Bell T. & T. Co.* (No. 67-574, E.D. La.); *Weeks v. Southern Bell T. & T. Co.*, 277 F. Supp. 117 (S.D. Ga., 1967), now on appeal to the 5th Circuit; *Dixon v. AVCO* (No. 6660, E.D. Ohio); *Wheeler et al. v. Bohn Aluminum and Brass Co.* (No. 68-7, W.D. Mich.). See also, *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind., 1967), now on appeal to the 7th Circuit; *Urynowicz v. United Technology Center* (No. 49288, N.D. Cal.); *Freeman et al. v. Pacific T. & T. Co.* (No. 49218, N.D. Cal.); *Richards v. Griffith Rubber Mills* (D.C. Ore.); *Singer v. Boeing Co.* (No. 7693, W.D. Wash.).

In its 1963 report, the President's Commission on the Status of Women[5] stated that it was,

> "convinced that the U.S. Constitution now embodies equality of rights for men and women * * *. But judicial clarification is imperative in order that remaining ambiguities with respect to the constitutional protection of women's rights be eliminated. Early and definitive court pronouncement, particularly by the U.S. Supreme Court, is urgently needed with regard to the validity under the 5th and 14th amendments of laws and official practices discriminating against women, to the end that the principle of equality become firmly established in constitutional doctrine." *American Women*, page 45 (GPO, 1963).

Forty-eight percent of the women between ages 18 and 64 are in the labor force.[6] Eleven percent of American families are headed by women; 35% of these families live in poverty; 61% of the Nation's poor children live in families

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[5]Established by Exec. Order No. 10980, Dec. 1961, the Commission consisted of the Secretary of Labor, the Attorney General, other cabinet officers, and several public members.

[6]U.S. Dept. of Labor, "Monthly Statistics on the Woman Labor Force," data for May, 1968 (June 1968).

headed by women.[7] The median earnings of year-round full-time women workers in 1966 was only about 60% of that of men.[8] Nonwhite women with a high school education earn only slightly more ($2475) than nonwhite men with less than an eighth grade education ($2376), and considerably less than white men with less than 8 years schooling ($2945). White women with some college earn less ($3519) than men with an eighth grade education ($3681 for nonwhite men, $4611 for white men), and less than nonwhite women with some college ($3964).[9] More than one-third of the cases filed with the Equal Employment Opportunity Commission during its first year alleged discrimination because of *sex*.

2. The court below stated that the constitutional issue was insubstantial for the sole and simple reason that over sixty years ago this Court had upheld the convictions of employers who had violated state hours laws by employing women for periods prohibited by such statutes. *Muller v. Oregon, supra; Ex Parte Miller, supra.* The threshold question of whether a three-judge court was required was never challenged. The Nineteenth Amendment, the greatly increased participation of women in the work force, smaller families, longer lifespan, more modern medical knowledge, greater union membership, greater protection of workers of both sexes against excessive hours of work under the Federal Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, state premium pay laws, and most important, the promise of protection against employment discrimination under the Civil Rights Act of 1964, are among the many factors which render virtually irrelevant the considerations in those cases which caused this Court to uphold these convictions.

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[7]U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty," April, 1968.

[8]U.S. Dept. of Commerce, Bureau of the Census: CPR-60, No. 53.

[9]*Ibid.*

Since the decision in *Muller* mechanization of industrial processes and automation have made any difference in strength or endurance between men generally and women generally irrelevant in employment. In the days of *Muller*, women had no political rights and only the poorest and most disadvantaged engaged in employment outside the home. Under these circumstances they could be easy victims of unscrupulous employers. The woman who had no father, no husband, or no brother to support her was regarded as helpless as a minor child. While this Court's decision in *Muller* is of historical significance and was motivated by humanitarian considerations relevant to economic conditions then existing, it is anachronistic as a judicial precedent in today's economy. The conditions of working women as they were at that time do not now exist, and today equal opportunity and freedom from restrictions for women as well as for racial, ethnic or religious groups is recognized as a part of human rights.

Moreover, *Muller v. Oregon*, 208 U.S. 412 (1908), *Miller v. Wilson*, 236 U.S. 373 (1915) and *Ex Parte Miller*, 162 Cal. 687, 124 Pac. 427 (1912), are not in point because both the fact situations and the legal issue differed from that presented here. In those cases, the Court was not directly presented with the question of whether the Due Process and Equal Protection Clauses protected *women* in their right to follow legitimate occupations. None of those cases were brought by a woman who was claiming that her due process and equal protection rights had been invaded by state restrictive labor laws. Those cases involved employers who had been subjected to fines under criminal statutes for employing women for periods longer than the state statutes prescribed. The issue was whether the employers' right of freedom to contract had been invaded by such restrictions, and the Court held that it had not. The defendants, who were men employers rather than women employees, could not properly raise the issue of unconstitutional discrimination on the ground of sex. See, *e.g.*, *Cronin v. Adams*, 192 U.S. 108 (1904), in which this Court ruled that the plain-

tiff, a male saloon operator, had no standing to raise the issue of whether an ordinance was unconstitutional because it restricted the activities of women since the plaintiff was "not a female nor delegated to champion any grievance females may have under the ordinance."

That the protection of women in their freedom to pursue gainful occupations may not have been a prime motivation for the adoption of the Fourteenth Amendment is not relevant in determining their rights to its protection. The situation presented here is somewhat similar to that presented in *Brown v. Board of Education* (1954) 347 U.S. 483. It was there contended that at the time of the adoption of the Fourteenth Amendment, there was no intention to protect a Negro child's right to attend integrated schools. This Court rejected the argument, pointing out that the Constitution must be applied in light of the social and economic factors in modern society rather than by a study of the customs of the 1860's. As this Court summed it up in *Harper v. Virginia Board of Education*, 383 U.S. 663, 669 (1966):

> "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. * * * Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."

Certainly, the dicta in cases decided more than a half century ago do not render future challenges forever insubstantial. Compare: *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colgrove v. Green*, 328 U.S. 549 (1946) with *Baker v. Carr*, 369 U.S. 186 (1962); *Minersville School Dist. v. Gobitus*, 310 U.S. 586 (1940) with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Kesler v. Dept. of Public Safety*, 369 U.S. 153 (1962) with *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

3. The holding below that women are not "persons" under the Fourteenth Amendment and that they are not entitled to the guarantees of Due Process and Equal Protection available to men is contrary to numerous decisions of this Court. The right to earn a living unhampered by legislative and governmental restraints is one of the most valuable rights protected by the Constitution. As Justice Douglas pointed out in *Barsky v. Board of Regents*, 347 U.S. 442, 472:[10]

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property * * * It does many men little good to stay alive and free and propertied if they cannot work. To work means to eat. It also means to live."

Plainly, women "are not 'non-persons'. They are humans * * * [and] clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." See *Levy v. Louisiana*, 390 U.S. __, 88 S. Ct. 1509, 1510-11. Women are "persons" under the Fourteenth Amendment, and state laws cannot deprive them of the right "to work", "to eat", and "to live."

Accordingly, women may not be deprived of liberty or property without due process of law. This Court has repeatedly held that the right to engage in legitimate occupations is protected by the Due Process Clause. *Takahashi v. Fish and Game Commission*, 334 U.S. 410; *Truax v. Raich*, 239 U.S. 33; *Smith v. Texas*, 233 U.S. 630; *Yick Wo v. Hopkins*, 118 U.S. 356. It is "fundamental" to the right "to life, liberty, and the pursuit of hapiness." *Yick Wo*, *supra*, at 370. Being both a "liberty" and a "property" right, it is constitutionally protected, not only from confiscation by legislative edict, but also from any unjustifiable impairment

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[10] The quotation is from the dissenting opinion of Justice Douglas. The case itself is not in point as it involved a question of whether persons could be banned from certain types of employment in the public interest because of moral unfitness. See discussion, *infra* pages 13-14.

or abridgment. *Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana,* 165 U.S. 578, 589-90. In *Yick Wo,* this Court emphasized the importance of this constitutional right by stating: "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (118 U.S. at 370.)

Since the right to earn a living is an inalienable right and one of the most valuable ones protected by the Due Process Clause, this right cannot be taken away from a person by the legislature, not even under the guise of conferring some benefits on some other persons. In concluding that the state legislature could deprive the plaintiffs of their inalienable right to earn their livelihoods on the assumption that *some* women wish to have such limitations imposed on them, the decision below is in direct conflict with the above decisions of this Court. See *Takahashi v. Fish and Game Commission, supra,* 334 U.S. 410, 418-19, wherein this Court emphasized that a Japanese alien could not be deprived by statute of the right to engage in the occupation of fisherman even though such deprivation would benefit United States citizens by eliminating competition.

This is not a case in which this Court must decide whether it is better to restrict women who wish to work long hours and compete with men, for the benefit of men and other women, who do not wish to do so. The inalienable right of a woman to earn a livelihood cannot be bartered away by a State for the purpose of giving preferential treatment to some other person or persons.

Appellants do not contend that the Fourteenth Amendment would prevent the States from passing laws to protect the public by prohibiting persons who lack the necessary skill or competence from engaging in occupations which require such abilities, or by prohibiting persons of proven moral incapacity from engaging in certain occupations.

Appellants also recognize that it would be constitutional for a State to pass laws which protect the health and safety of *all* persons in certain employments against special hazards that are inherent in such employments. We do contend that the Fourteenth Amendment prevents a State legislature from making generalizations that *all* women are physically inferior to *all* men and from passing laws to prevent *all* women from engaging in certain occupations on the basis of that assumption. Many women are physically stronger and have more physical endurance than many men. As individuals these women cannot be deprived of liberty and property without due process nor can they be denied the equal protection of the law. See *Stell v. Savannah Chatham County Board of Education*, 333 F.2d 55, 61-62, certiorari denied, 379 U.S. 933; and *Orleans Parish School Board v. Bush*, 242 F.2d 156, 163, certiorari denied, 354 U.S. 921, wherein the Fifth Circuit held that Negro children could not be deprived by a State government of their right to attend integrated schools on the assumption that Negro children as a group are academically inferior to white children as a group.

4. The State statute here involved is also unconstitutional because it denies rights guaranteed by the Equal Protection Clause. It does this by making an arbitrary classification on the basis of sex, thus subjecting an identifiable group of persons to invidious discrimination in one of the freedoms most vital to human existence. As the Court observed in *Hernandez v. Texas*, 347 U.S. 475, 478, "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for treatment not based on some reasonable classification, the guarantees of the Consti-

tution have been violated." See also *Frost v. Corporation Commission,* 278 U.S. 515, 522; *Airway Corporation v. Day,* 266 U.S. 71, 85.

It is common knowledge that women, throughout our history, have been singled out for unequal treatment, not only in the payment of wages, but also in the number of hours which they may work in private callings, and this despite the Court's admonition that while a "State may legislate so as to exclude from work in such private calling those whose competence might cause injury to the public, * * * the tests and prohibitions should be enacted reference to that object and so as not unduly 'to interfere with private business, or impose unusual and unreasonable restrictions upon lawful occupations'" (*Smith v. Texas,* 233 U.S. at 636; *New State Ice Co. v. Liebmann,* 285 U.S. 262, 278). California's "Jane Crow" law, we submit, does not meet the tests. Not only does it "interfere with private business," but it also "imposes unusual and unreasonable restrictions upon lawful occupations." Plaintiffs are competent women workers, and their employment in the jobs which they seek would cause no "injury to the public."

Nor can California's "Jane Crow" law be upheld on the theory that it prevents the exploitation of women workers. At the time of *Muller v. Oregon,* the Court recognized the disadvantaged and dependent position of a woman in the economy, and it based its decision, in part, on the view that "legislation to protect her seems necessary to secure a real equality of right" (208 U.S. at 422). Moreover, the *Muller* approval of sex as a basis for legislative classification made it possible to uphold labor standards legislation in spite of the ruling in *Lochner v. New York,* 198 U.S. 45 (1905) that a restrictive hours law as applied to bakery employees, including men, was unconstitutional. Today the situation is turned around: laws which treat women workers differently than men workers *deny* "equality of right" to women. Also, hours legislation for both sexes was upheld in 1917 in *Bunting v. Oregon,* 243 U.S. 426, so that the doctrine of

special treatment for women no longer need be used in order to sustain the constitutionality of State labor standards legislation. It has been pointed out that judicial approval of laws classifying persons by sex "totally defeats the meaning of equal protection of the laws for women," and suggested that "just as separate schools for Negro and white children by their very nature cannot be 'equal,' employment classification on the basis of sex is today inherently unreasonable and discriminatory." Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 G.W. Law Rev. 232, 237, 250 (1965).

The doctrine of special treatment for women, like the misguided doctrine of "separate but equal" treatment for Negroes, must now be discarded. And this is exactly what the three-judge court did in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala., 1966). There, in striking Alabama's law which excluded women from jury service, the court said:

> "The argument that the 14th Amendment was not intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society."

While the court below recognized that today's woman "is man's equal and to be accorded the same rights and privileges as her male counterpart" (App. A, p. A-7), it refused to apply the above principles and relied instead on the ancient rationale of *Muller v. Oregon, supra*.

5. Since the three-judge court in this case was properly convened, it had jurisdiction to dispose of all questions, including non-constitutional ones. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73; *Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 428; *United States v.*

Georgia Public Service Commission, 371 U.S. 285, 287; *Sterling v. Constantin*, 287 U.S. 378, 393-94; *Railroad Commission v. Pacific Gas Co.*, 302 U.S. 388, 391.

Swift & Co. v. Wickham, 382 U.S. 111, relied on by the court below, is not applicable. In that case, there was no substantial constitutional issue—simply a conflict between state and federal law. The case of *Engineers v. Chicago, R.I. & P.R. Co., supra*, decided after *Swift Co. v. Wickham*, points out this distinction. As there are substantial constitutional issues in this case under the Due Process and Equal Protection Clauses of the Fourteenth Amendment which the three-judge court decided on the merits, it should have decided as well the following non-constitutional questions: (1) whether Title VII of the Civil Rights Act superseded Section 1350 of the California Labor Code by virtue of the Supremacy Clause of the Constitution, Article VI, par. 2, and Section 708 of the Civil Rights Act of 1964; and (2) whether the plaintiffs were entitled to the relief requested under that Act.

There is no question from the express phraseology of Section 708 of the Civil Rights Act and from its legislative history discussed above that it was the intent of Congress to nullify state laws which have the effect of discriminating against persons in employment on the basis of sex.

6. The District Court (sitting as a three-judge court and also as a single-judge court) denied plaintiffs due process of law. Thus, on May 10, 1968, the three-judge court (speaking through Judge Stephens) decided the case against plaintiffs on the 14th Amendment issue without considering the Supremacy Clause question or the Title VII issue, which is intimately entwined with and dependent upon the 14th Amendment issue. On the very same day, Judge Stephens (sitting as a single-judge court) also refused to pass on the Supremacy Clause issue, invoking (erroneously, we submit) the abstention doctrine, and then dismissed the case in its entirety. Plaintiffs were thus relegated to the State courts for a resolution of their cause of action under Title VII of

the Civil Rights Act, as well as a resolution of the Supremacy Clause issue, and this despite the fact that under Section 706(f) State courts have no jurisdiction to entertain a suit under Title VII of the Civil Rights Act.

The single judge misapplied the abstention doctrine. While this doctrine is available when the state statute is of an uncertain nature, the unconstitutional aspect of the California statute is clear; it provides for different treatment of workers based on sex, and the amendment enacted after the institution of this action retains the sex distinction and in no way alters the issue. *Zwickler v. Koota,* 389 U.S. 241, 249, 251. This Court has said repeatedly that a federal court cannot use the abstention doctrine so as to "abdicate" from exercising its proper jurisdiction. *England v. Medical Examiners,* 375 U.S. 411, 416. Nor can it force a litigant into a state court against his will. *Id.* at 415. The instant case is an example of abdication of judicial responsibility both by the three-judge court and the single-judge court.

Appellant submits that this appeal brings before the Court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

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PROOF OF SERVICE

I, Marguerite Rawalt, the attorney for Velma L. Mengelkoch, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the day of August, 1968, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On Mary Fazzio and Dea C. Kaskela, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney Phill Silver, Esq., 1680 North Vine Street, Hollywood, California 90028.

2. On the Industrial Welfare Commission and Division of Industrial Welfare of the State of California, and on North American Aviation, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

To: Thomas Lynch, Esq., Attorney General of the State of California, Sacramento, California

To: William Zessar, Esq., Deputy Attorney General of the State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012

To: B. Franklin Walker, Esq., Deputy Attorney General of the State of California, 350 McAllister Street, Room 6000, San Francisco, California.

To: Stephen E. Tallent, Esq., Attorney for North American Aviation, Inc., Gibson, Dunn and Crutcher, 643 South Spring Street, Los Angeles, California 90014

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